

Ogden River

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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PLAIN CITY IRRIGATION  
COMPANY, a corporation,

*Plaintiff,*

— vs. —

HOOPER IRRIGATION  
COMPANY, a corporation, et al.,

*Defendants.*

} Case  
No. 9135

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BRIEF OF APPELLANTS

LYNNE IRRIGATION COMPANY, INC.  
NORTH OGDEN IRRIGATION COMPANY, INC.  
WESTERN IRRIGATION COMPANY, INC.  
PLAIN CITY IRRIGATION COMPANY, INC.  
UTAH STATE ENGINEER

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WESTERN IRRIGATION COMPANY, INC.  
PLAIN CITY IRRIGATION COMPANY, INC.  
UTAH STATE ENGINEER

### STATEMENT OF THE CASE

This is an appeal by the named irrigation companies, herein sometimes referred to as the "lower users," and by the State Engineer of Utah, from an Order Directing Distribution of Water entered by the District Court of Weber County, Utah, on August 13, 1959. Ogden City has cross-appealed.

On April 1, 1948, the District Court of Weber County made and entered its decree adjudicating the water rights

on the Ogden River. Paragraph 7 of such decree, and particularly subdivision (a) thereof, taken in conjunction with the tabulation of rights, fixed the rights of Ogden City with respect to the flow from the 48 artesian wells at Pineview, *in exchange for which* the City was and is to release to the lower users, as directed by the State Engineer, the water to which the City is entitled by virtue of its ownership of four thousand five hundred (4,500) shares of stock of Ogden River Water Users' Association (Pineview Reservoir). The decree further provided that the City was to make all payments to the Association requisite to perfect the right to the continued use of the water represented by such shares of stock.

Ogden River Water Users' Association's storage capacity in Pineview Reservoir is 44,175 acre-feet. The Association, by contract with the United States, stores water in the reservoir under a storage right owned by the United States. Because of less than normal snowfall on the water shed, the flow of the river in the year 1959 produced but approximately 30,915 acre-feet of water capable of being stored. This was approximately .7 of an acre-foot per share of stock, rather than a full acre-foot per share, and was obviously less than adequate to fill the needs of the shareholders. Further, 15,015 acre-feet of this total flow of 30,915 acre-feet, or approximately one-half thereof, was subject to a prior right of Utah Power & Light Company for power purposes. This 15,015 acre-feet is sometimes hereafter for convenience referred to as "power water." By virtue of its prior right, Utah Power & Light Company had the

right to require the Association to pass this power water through the reservoir, which if done would have reduced the Association's storage water to but 15,900 acre-feet, or to less than one-third of an acre-foot of water per share of stock. To avoid the necessity of passing the power water through the reservoir, and to the end of preserving by storage the full 30,915 acre-feet for the use of its shareholders, the Association in the Spring of 1959 entered into an agreement with Utah Power & Light Company whereby for a consideration the Power Company agreed to forego its right to have the power water released to it. By virtue of this agreement the Association was able to and did hold in storage for the use of its shareholders the full 30,915 acre-feet of water, amounting to approximately .7 acre-foot per share. It is the status of this 15,015 acre-feet of so-called power water under the decree referred to above, that gives rise to the present controversy. If Ogden City's prorata share of this water is water to which the City is entitled by virtue of its 4,500 shares in Ogden River Water Users' Association, then it, together with any other water to which such shares were entitled, constituted water to be released to the lower users. On the other hand, if Ogden's rights to such water arose other than under such 4,500 shares, then the water was not subject to the Decree, and the lower users had no interest therein.

The State Engineer directed Ogden River Water Users' Association to release to the lower users *all* of the water represented by the City's 4,500 shares of stock, which included the water stored by the Association under

its agreement with the Power Company. Ogden City, while not contending that the Association was without right to acquire and store the power water, and while not contending that it was not obligated to pay its prorata share of the cost thereof, nevertheless did contend that the lower users were not entitled to receive the portion of such power water as the City was entitled to under its 4,500 shares of stock, and instituted these proceedings to enjoin such release by the State Engineer and by the Association.

The determination by the lower court, from which this appeal and the cross-appeal are taken, was in sum and substance that the so-called power water was water to which the City was entitled as a shareholder in the Association, and that the City held it "in trust" for the lower users, but that the lower users might have its use only upon payment to the City of a fixed dollar amount per acre-foot.

Thus, by the determination of the court, this power water was neither fish nor fowl insofar as the adjudicating decree of April 1, 1948, is concerned. If such water was in fact water which the City held for the lower users under the decree, then the lower users were entitled to receive it without payment, as the decree obligated the City to bear the cost. On the other hand, if the power water was not subject to the decree, as contended by the City, then the City did not hold the water for the use of the lower users, as trustee or at all, and it was completely without obligation to the lower users. It is

obvious, accordingly, why all parties felt compelled to appeal.

The foregoing is perhaps an oversimplification of the litigation, but it should make for easier understanding the Statement of Facts hereinafter set out. The proceedings are in equity, and this Court has full power to review all questions of law and fact, and to set aside the order and judgment of the lower court if in this Court's opinion such order and judgment is not supported by the evidence. *Jensen v. Howell*, 75 Utah 64, 282 P. 1034; *Tanner v. Provo Reservoir Co.*, 99 Utah 139, 98 P. (2) 695; *Shaw v. Jeppson*, 121 Utah 155, 239 P. (2) 745.

#### STATEMENT OF FACTS

A dispute and controversy existing as to the effect of the draft on or use of water from wells in the Huntsville area by Ogden City on the flow Ogden River, and the effect thereof on the rights of the appropriators and users of water from Ogden River, known as the Upper Valley Users and the Lower Valley Users, the parties concerned entered into a stipulation dated July 23, 1929. The stipulation, among other things, provided that Ogden City agreed that when a reservoir was constructed on Ogden River, Ogden City would supply to the flow of Ogden River during the irrigation season a quantity of water from the reservoir equal to the quantity at that time drawn from the wells, which quantity it was agreed was then 20 second-feet. The stipulation was for the

settlement of the instant water rights, and was also for a trial period for gathering facts and information, and for reservoir construction; and in view of this, further provided that should the reservoir be built, Ogden City would supply to the flow of Ogden River a quantity of water from the reservoir equal to that being drawn from the wells. The Lower Valley Users' rights were stipulated, and they were entitled after the high or flood water season to the flow 135 second-feet from Ogden River and its tributaries. It further provided that if the reservoir was constructed, then so long as Ogden City supplies from the reservoir to the flow of Ogden River a quantity of water equal to the quantity at present drawn from the wells, agreed as being 20 second-feet, then the Upper Valley Users and Lower Valley Users should not question the right of Ogden City to water from Cold Water Canyon, Warm Water Canyon, and Wheeler Canyon, as well as the water from the wells (R. 2-7).

Such stipulation was incorporated wholly in a Decree of the Court dated July 31, 1929 (R. 1-8).

The reservoir was constructed, and facts and information were gained. The parties concerned, the Upper Valley Users, the Lower Valley Users, and Ogden City, had negotiations to determine the precise language and provisions to be incorporated in the Findings of Fact, Conclusions of Law, and Decree with respect to the adjudication of rights of all the users of water upon the Ogden River and its tributaries. On the court hearing had on April 1, 1948, a stipulation of the parties was made before the court on the language to be employed in the

Findings and Decree (R. 77, pages 2-9 particularly) and based thereon the Findings and Decree dated April 1, 1948, were made and entered. Paragraph (7) (a) and (b), and other paragraphs not here pertinent, in said Findings and Decree resulted (R. 76, pages 10, 11). Such further, in brief, provided for the permanency of the settlement of all disputes, controversies, and litigation.

Under the provisions of said paragraph (7) (a) of said Decree and Right 402 (the wells' right), Ogden City was entitled to the flow of the 48 wells located at the bottom of Pine View Reservoir, limited to 22 second-feet; and

“In exchange for the water which by diversion from such wells Ogden City withholds from the other water users of such river, said City shall set apart the water to which it is entitled upon 4500 shares of the stock of Ogden River Water Users Association, to the use of the other water users of said Ogden River to be used by them at such times and in such manner as hereinafter set out, and shall be bound to make all payments for such water requisite to perfect the rights to the continued use of the water represented by said shares of stock, which said exchange the Court decrees is a fair and equitable exchange.

“That the water represented by said 4500 shares of stock shall be distributed only during the low water period of the irrigation season to the water users as set out in the Tabulation of water rights herein, in such manner and at such times as may be determined by the State Engineer, or by his direction, by the Water Commissioner

upon the River, to be reasonably available for the use of such water users after consultation with them."

The Decree further provided in paragraph 9-(a) thereof that water to supply rights subsequent to March, 1903, shall be shut off before the supply to rights with earlier priorities than 1903 are diminished, except that which is shown in said Tabulation as rights numbered 43 and 402 (the wells' right) which said rights numbered 43 and 402 shall not be shut off so long as the provisions of paragraph (7) herein are carried out (R. 76, page 12).

The Lower Valley Users' rights are set out in the Decree as rights 1 to 36, inclusive, having priorities from 1848 to 1890 (R. 76, pages 16-22).

Ogden City's well rights are set out therein as right 402 having priorities from 1914 to 1932 (R. 76, page 44).

The Ogden River Water Users' Association is a corporation formed on or about November 1, 1933 (R. 9). Its Articles provide, among other things, that it was organized for the purpose of purchasing, condemning, leasing, acquiring, or constructing dams, reservoirs, etc., and for the purpose of purchasing, condemning, leasing or acquiring water, water rights, and other property; and operating; and to lease, sell, or otherwise dispose of water, water rights, etc., and furnish the same to its stockholders. It was empowered to incur indebtedness, contract with the United States or other parties for the purchase, acquisition, or lease of water, water rights, etc. (R. 10-11). The stock of the corporation is assess-

able, and each stockholder shall be entitled to the ownership of not less than one acre-foot of water per annum, or so much thereof as will constitute a proportionate part of the water available for each share of stock subscribed. The total shares of stock are 44,175 (R. 11-12).

The appellant corporations are some of the owners of the water rights adjudicated to the Lower Valley Users by said Decree of April 1, 1948, and encompass rights 10, 22, 23, 24, 26, 28, 29, 31, and 32. These corporations, together with four others, were cited into court as representative of the class constituting the Lower Valley Users, the owners of rights 1 to 36, inclusive, under the water adjudication decree of April 1, 1948.

Ogden City sought by its petition and proceedings thereunder an adjudication that under the Decree of April 1, 1948, and the Articles of Incorporation of the Ogden River Water Users' Association, and the contract made by Ogden River Water Users' Association, that Ogden City is the owner of 3,400 acre-feet of water (10,000 shares times 15,015 acre-feet) as its proportionate share as a stockholder of the Association in the water acquired from Utah Power & Light Company; and that the State Engineer be enjoined and restrained from allocating or delivering any part of such waters except with its express consent, order, and approval (R. 16, 17).

The appellants sought an adjudication that they, and other Lower Valley Users, were entitled to receive all of the water to which Ogden City was entitled upon

4,500 shares of its stock in Ogden River Water Users' Association under the judgment and decree herein dated April 1, 1948; that 4,500/44,175 part of the water secured by Ogden River Water Users' Association from Utah Power & Light Company is a part of the water distributable by virtue of Ogden City's ownership of said 4,500 shares of stock, and a part of the water entitlement of the Lower Valley Users; that Ogden City is bound to pay for the stock assessments upon said 4,500 shares of stock; and that the State Engineer be directed to deliver in accordance with said Decree the water upon said 4,500 shares of stock (R. 40).

The court decreed that the water acquired from Utah Power & Light Company by Ogden River Water Users' Association belonged to the Association and it acted legally and properly in allocating the same to and assessing the cost thereof against its stockholders in proportion to the amount of stock owned by each.

Further, that the water obtained from Utah Power & Light Company by the Association was not subject to paragraph (7) of the decree entered for the reason that it is additional water created or made available to the Association over and above that contemplated by the parties to the stipulation on which the decree was based, and over and above that contemplated by the court when the decree was entered.

The court ordered that so much of such water as is represented by the 4,500 shares of stock came to the City because of its holding the water represented by said 4,500 shares of stock in trust for the benefit of the Lower

Valley Users, and the City may not profit from this favorable contract which accrued to it by virtue of its fiduciary relationship to the Lower Valley Users to the prejudice of said beneficiaries. Upon the City being reimbursed in full for the extra expenses it incurred in acquiring said water and administration costs incidental thereto, and to its compliance with the terms of the Order, each of the Lower Valley Users shall have the right to the use of its proportionate share of said water, provided it pays the City's acquisition and administration costs within a reasonable time (R. 51, 52).

The court fixed Ogden City's extra expenses as \$1.28 per acre-foot and administrative cost of 6 cents per acre-foot. Ordered that the water represented by 4,500 shares of stock is 1,543 acre-feet; determined that the Lower Valley Users are entitled to purchase said water in an amount set forth in the tabulation of right numbers, names, and acre-feet set forth in Exhibit A of said Order, the computation being based on an allocation proportionate to the 156.8 second-feet low water flow rights of the Lower Valley Users. A publication of a Notice of Right to Purchase Irrigation Water was required entitling each company to ten days after publication to pay to Ogden City for water which it desired, and any water sold to be delivered by the State Engineer. Any water not paid for shall belong to Ogden City free from any fiduciary obligation or duty to sell to said Lower Valley Users (R. 52-56).

The Return of Ogden City of its Actions under Order Directing Distribution of Water showed 1,360.64 acre-

feet of water sold out of 1,544.27 available for \$1,823.25 with 183.62 acre-feet balance (R. 58, 59).

Thereupon the appeal was taken by the Appellants for their having been deprived of water to which they were entitled under the provisions of the Decree of April 1, 1948, and a cross appeal by Ogden City claiming that such water is the property of Ogden City free and clear of any trust obligations.

### STATEMENT OF POINTS

#### POINT I.

THE COURT ERRED IN MAKING THE ORDER DIRECTING DISTRIBUTION OF WATER DATED AUGUST 13, 1959, IN THAT IT IS UNSUPPORTED IN FACT AND IN LAW; THE COURT ERRED IN FAILING TO INCLUDE ADMITTED ALLEGATIONS OF THE PETITION, AND PARTICULARLY PARAGRAPHS 4, 5, 8, AND 10 THEREOF; AND THE COURT ERRED IN MAKING FINDINGS WHOLLY UNSUPPORTED BY PLEADINGS OR PROOF.

#### POINT II.

PARAGRAPH 7 OF THE DECREE HEREIN DATED THE 1st DAY OF APRIL, 1948, IS THE LAW IN THIS CASE.

#### POINT III.

THE COURT ERRED IN DETERMINING THAT THE WATER ALLOTTED TO OGDEN CITY, WHICH WAS OBTAINED FROM THE UTAH POWER & LIGHT COMPANY BY THE OGDEN RIVER WATER USERS' ASSOCIATION, IS NOT SUBJECT TO PARAGRAPH 7 OF THE DECREE OF APRIL 1, 1948.

POINT IV.

THE COURT ERRED IN DETERMINING THAT THE WATER ACQUIRED BY THE OGDEN RIVER WATER USERS' ASSOCIATION FROM THE UTAH POWER & LIGHT COMPANY WAS NOT INTENDED OR CONTEMPLATED BY THE PARTIES TO THE STIPULATION BETWEEN OGDEN CITY AND THE LOWER VALLEY USERS.

POINT V.

THE COURT ERRED IN REQUIRING THE LOWER VALLEY USERS TO PAY FOR THE WATER ACQUIRED BY OGDEN CITY BY VIRTUE OF ITS OWNERSHIP OF 4,500 SHARES OF STOCK OF THE OGDEN RIVER WATER USERS' ASSOCIATION, AND IN REQUIRING OF THE LOWER VALLEY USERS TO PAY ANY COST OR EXPENSE TO OGDEN CITY WHATSOEVER TO ENABLE THE LOWER VALLEY USERS TO SECURE SUCH WATER.

POINT VI.

THE COURT ERRED IN DETERMINING THAT ANY WATER TO WHICH IT WAS ENTITLED UPON 4,500 SHARES OF STOCK OF OGDEN RIVER WATER USERS' ASSOCIATION BELONGED TO OGDEN CITY FOR ANY PURPOSE OTHER THAN ITS DELIVERY TO THE LOWER VALLEY USERS IN EXCHANGE FOR WATER WHICH OGDEN CITY DIVERTED FROM ITS WELLS.

ARGUMENT

POINT I.

THE COURT ERRED IN MAKING THE ORDER DIRECTING DISTRIBUTION OF WATER DATED AUGUST 13, 1959, IN THAT IT IS UNSUPPORTED IN FACT AND IN LAW; THE COURT ERRED IN FAILING

TO INCLUDE ADMITTED ALLEGATIONS OF THE PETITION, AND PARTICULARLY PARAGRAPHS 4, 5, 8, AND 10 THEREOF; AND THE COURT ERRED IN MAKING FINDINGS WHOLLY UNSUPPORTED BY PLEADINGS OR PROOF.

The District Court in reaching the Order it made has used "ideas" unsupported by pleading or proof, and has failed to consider alleged and admitted allegations of fact and evidence. The ingredients for any order, decree or judgment historically have been from allegations made and admitted and from evidence. In this case the only evidence tendered and received was the minutes of June 8, 1959, of the Board of Directors of the Ogden River Water Users' Association. Such then, plus allegations made and admitted must constitute the ingredients or the premises for the only acceptable order a court could make. Pleadings made and denied absent proof cannot certainly be premises for any conclusion and resulting order. The system devised and long utilized for the attainment of proper decisions in any matter in our courts has been the utilization of and the actual statement of facts, that is, facts alleged and proved or admitted. From these and these alone can conclusions be drawn based upon such facts from which an order, decree or judgment can be drawn firmly bottomed.

Consider then the following:

The court finds (R. 47, paragraph 2 abridged) that the Ogden River Water Users' Association was organized for, among other purposes and objects, the purpose

and object of contracting with the United States of America to acquire for the benefit of its stockholders water originally appropriated by the United States of America and acquired right 397. That Ogden City subscribed to 10,000 shares of stock of said Association and is the owner and holder subject only to the completion of the payment of the purchase price for said shares of stock (R. 47, paragraph 3 abridged). That the Association in 1959 acquired water from the Utah Power & Light Company under Right No. 37 for the use and benefit of the Association and its stockholders (R. 48, paragraph 5 abridged); and allocated such water among its stockholders in proportion to the amount of stock held by each (R. 49, paragraph 6 abridged). The court then finds that the agreement with Utah Power & Light Company has, in legal effect, created *additional water* for the use of its stockholders not available in previous years and not contemplated as available or to be available to said Association and its stockholders by said Decree (Decree of April 1, 1948, paragraph 7) or by the parties to the stipulation upon which the Decree was entered (R. 49, paragraph 8).

Having gotten this far, the court finds that the spirit of the stipulation on which the Decree was based and the legal meaning of said decree, particularly paragraph 7 thereof, is that Ogden City holds in trust for the benefit of the "Lower Valley Users" the water represented by 4,500 shares of stock in the Association, with which we Appellants agree, but it goes on and says, the use of the water usually, and with variations to be reasonably

anticipated due to climatic and other conditions, available under Right No. 397 and represented by 4,500 shares of stock is to be available to the "Lower Valley Users" without cost to them and any *additional or extra water* up to a total of 4,500 acre-feet per annum is to be available to the "Lower Valley Users" upon payment to the City of any additional or extra expense it assumes or must pay in acquiring said additional or extra water (R. 50).

It is thought that the foregoing fairly shows the process of reasoning leading to the conclusion and order of the court that the Lower Valley Users pay for the water acquired by the Association for its stockholders from Utah Power & Light Company.

Now to the facts, and which facts, were they incorporated in the findings of the court, would lead to an altogether different order than was made.

1. The fact is that not only was the Ogden River Water Users' Association organized for the purpose and object of contracting with the United States of America, but and to more precisely state the matter as set out in Article V of its Articles of Incorporation which Ogden City alleged and which the appellants admitted (R. 10, 37).

This corporation is organized . . . for the purpose of purchasing, condemning, leasing or acquiring water, water rights. . . . Water will be furnished only to the stockholders of this corporation.

And for carrying out the purposes set forth the corporation shall have the power to . . . contract with the United States or other parties for

the purchase, acquisition, or lease of water, water rights. . . . (R. 10, 11 abridged)

The water which the Association acquires for its stockholders, and which it distributes to its stockholders, is not limited to such as it acquires by contract with the United States, but includes such as it acquires by contract with the Utah Power & Light Company (or any other party). Nor is it limited to water under Right No. 397 which is the right under which it acquired water from the United States, but includes water under Right No. 37 which is the right under which it acquired water from the Utah Power & Light Company.

The findings of the court do not include therein Article V.

2. The fact is that Article IX of the Articles of Incorporation of the Ogden River Water Users' Association was alleged as a fact by Ogden City and was admitted by Appellants (R. 11, 12, 37). Such in substance provides that stock of the Association is assessable, and each stockholder shall be entitled to the ownership of not less than one acre-foot of water per annum or so much thereof as will constitute a proportionate part of the water available for each share of stock subscribed.

The findings of the Court do not include therein Article IX.

3. The fact is that in 1959 the Ogden River Water Users' Association was able to distribute water to its subscribers from all water it obtained but 70 per cent of the total subscription of each subscriber (Ex. A, R. 44).

The findings of the court do not include therein this documentary evidence.

4. The fact is that the Decree of April 1, 1948, and paragraph 7 thereof was made subsequent to the incorporation of the Ogden River Water Users' Association and provided therein that:

"In exchange for the water which by diversion from such wells Ogden City withholds from the other water users of such river, said City shall set apart the water to which it is entitled upon 4500 shares of the stock of Ogden River Water Users Association, to the use of the other water users of said Ogden River to be used by them at such times and in such manner as hereinafter set out, and shall be bound to make all payments for such water requisite to perfect the rights to the continued use of the water represented by said shares of stock, which said exchange the Court decrees is a fair and equitable exchange."

And provided further under paragraph 9-(a) that the rights Nos. 43 and 402 (Ogden City rights) shall not be shut off so long as the provisions in paragraph 7 herein are carried out.

The findings of the court do not include these specially.

The foregoing facts, coupled with other admitted facts, show that the court could not possibly find from such facts and evidence that the water acquired by the Association from Utah Power & Light Company was *additional water* or *extra water*. In fact, it was but a part and parcel of all of the water the Association procured during 1959 in accordance with its Articles of Incorporation.

ration, and had for distribution to its stock subscribers. They show that but 70 per cent of 4,500 acre-feet of water was available on the 4,500 shares of stock available to and belonging to the Lower Valley Users. Nor could the court find the spirit of the stipulation and decree was that the water under Right No. 397 only was to be the water to reach the Lower Valley Users under the 4,500 shares of stock, for neither the stipulation nor the decree makes such limitation; and such an interpretation does violence to and is wholly inconsistent with the nature of the shares of stock of the Association, with the stipulation, and the decree. Observe that Ogden City does not contest the authority of the Association to acquire water for its stockholders, nor to charge them therefor, nor does it claim it is not entitled thereto.

To the contrary, Ogden City contends, and there, of course, was no issue on this, that it is entitled to its pro rata share of all water due it by virtue of its being a subscriber to 10,000 shares of stock in the Association. However, the City contends that portion of the water coming to it by virtue of its stock subscription to 10,000 shares, as was acquired by the Association from Utah Power & Light Company, belongs to it exclusively; and while the Decree of 1948 provides that the water from 4,500 of such shares shall go to the "Lower Valley Users," such does not include that portion of the water represented by such shares as was water acquired by the Association from Utah Power & Light Company. Shares are entitled to water. It is difficult, moreover impossible, to see how it can be contended the water entitlement of

10,000 shares is one thing, but the water entitlement on 4,500 of those shares is a different thing.

The first including all water distributed by the Association to Ogden City by the Association; the second, however, being only such proportion of the water as was not acquired by the Association by virtue of its contract with Utah Power & Light Company. The court has arrived at a "hybrid" determination that the water of 4,500 shares from the United States contract goes to the Lower Valley Users, but the water on 4,500 shares from Utah Power & Light Company goes to Ogden City as a "fiduciary" with the Lower Valley Users as beneficiaries with its obligation to all such water to the Lower Valley Users without profit.

Appellants feel that all of the water from 4,500 shares of stock by virtue of the Decree of 1948 goes to the Lower Valley Users and without cost to them in a money sense for the Decree particularly provides in paragraph 7 that Ogden City shall be "bound to make all payments for such water (4,500 shares) requisite to perfect the rights to the continued use of the water represented by said shares of stock." In considering cost from a different aspect, and particularly from the aspect of the stipulation and the Decree of 1948, the Lower Valley Users have paid for such water by exchange of the water which otherwise they would be entitled to have as prior appropriators and by their surrender to Ogden City of the water from the wells. The court in 1948 says, "Said exchange the court decrees is a fair and equitable exchange."

## POINT II.

PARAGRAPH 7 OF THE DECREE HEREIN DATED THE 1st DAY OF APRIL, 1948, IS THE LAW IN THIS CASE.

The Decree, including paragraph 7, was dated the 1st day of April, 1948, and was thereupon entered. It was a final determination. It was not vacated and set aside prior to the expiration of the time for taking an appeal, and the case in which such decree was made and entered was not appealed.

Under the provisions of the Utah Code Annotated, 1943, then subsisting, an appeal, if one was sought, had to be taken within ninety days from the entry of the Decree.

### 104-41-2. TIME FOR TAKING.

"An appeal may be taken within six months from the entry of the judgment or order appealed from, if such entry is made before the first day of July, 1939, but within ninety days from the entry of any judgment or order made on or after said first day of July, 1939, except that where the appeal is from a judgment granting a divorce such appeal may be taken within six months from the entry of the judgment."

The Decree, therefore, is the law in that case and binding upon all participants in that case now, including Ogden City and the Appellants, they being likewise the same parties as in the case at the time of the entry of the Decree. Such Decree is, therefore, *res adjudicata* and binding upon the District Court in the instant proceeding brought by Ogden City therein.

34 C. J. JUDGMENTS, Paragraph 1282.

“(1282) C. Conclusiveness of Adjudication —  
1. General Principles—a. Statement and Grounds of Doctrine. A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon either the same or a different cause of action. This doctrine, that a fact or question which has been actually and directly in issue in a former suit and has been judicially passed upon and determined by a domestic court of competent jurisdiction cannot be litigated again in a subsequent suit between the same parties or their privies, is simple and universally recognized in almost innumerable cases, the only difficulty or conflict being in its application to particular cases.

“The force of the estoppel lies in the judgment itself; it is not the finding of the court or the verdict of the jury which concludes the parties, but the judgment entered thereon. The reasoning of the court in rendering a judgment forms no part of the judgment, as regards its conclusive effect, nor are the parties bound by remarks made or opinions expressed by the court in deciding the cause, which do not necessarily enter into the judgment.”

The Appellants can not more clearly express the judgment of the court in 1948 than to here insert paragraph (7) (a), the second paragraph thereof, italicizing for emphasis the determination made.

*"In exchange for the water which by diversion from such wells Ogden City withholds from the other water users of such river, said City shall set apart the water to which it is entitled upon 4500 shares of the stock of Ogden River Water Users Association, to the use of the other water users of said Ogden River to be used by them at such times and in such manner as hereinafter set out, and shall be bound to make all payments for such water requisite to perfect the rights to the continued use of the water represented by said shares of stock, which said exchange the court decrees is a fair and equitable exchange."* (Emphasis supplied)

Has the District Court in the Order now appealed to this Court acted upon matters heretofore determined by the Decree of 1948?

It orders that the water represented by 4,500 shares of stock in the Ogden River Water Users' Association came to it because of its holding said stock in trust for the benefit of the Lower Valley Users. To this extent, there is an adherence to the Decree provisions. But the court departs from the Decree in holding that the Lower Valley Users must pay for the water! To this extent, there is a diametric departure from the Decree provisions of 1948 whereby the *City is bound to make all payments for water to which it is entitled upon said 4,500 shares.*

Not only has the District Court changed and varied the provisions of the 1948 Decree by its Order, but has attempted to interpret and say what was contemplated by the parties to the stipulation upon which the Decree was based, and to say what was contemplated by the Court

when the Decree was made. Both attempts being clearly to reach behind the Decree itself and to make meaningless the conclusiveness of the Decree of 1948.

But even assuming for purpose of argument the District Court had the right and authority to go back of the Decree in this way, an examination of the stipulation and the facts with respect to the stock of Ogden River Water Users' Association conclusively belies the correctness of the now finding of the District Court as to what was contemplated by the interested parties and by the court when the 1948 Decree was made.

First with respect to the stipulation, and we assume the court means the stipulation of July 23, 1929, as well as the stipulation entered into in open court on April 1, 1948, it in substance and meaning provided that because Ogden City was taking water from wells which deprived the Appellants, prior appropriators of water, Ogden City should replace such water in kind. The solution whereby this was to be accomplished was that Ogden City would exchange the water from 4,500 shares of stock in the Ogden River Water Users' Association for the water which it takes from the wells, and Ogden City would make all payments therefor. The arrangement was solidified in the wording of the Decree, paragraph (7), and this was agreed to by Ogden City, the Lower Valley Users, and the Upper Valley Users (R. 77, pages 6, 7, 8, and 9).

Next with respect to the water from 4,500 shares of stock of Ogden River Water Users' Association. The Ogden River Water Users' Association was formed and was in operation long prior to the Decree of 1948. Its

business, shown by its Articles of Incorporation, was the acquisition of water for its stockholders by purchasing, condemning, leasing, or acquiring; and it was for this purpose, among others, authorized to contract with the United States and others. Each stockholder was entitled to the ownership of not less than one acre-foot of water per annum or so much thereof as will constitute a proportionate part of the water available for each share of stock. Nothing whatever in the Articles of Incorporation of said Association, nor the Decree of 1948, or otherwise, limited the Association in the acquisition of water for its stockholders to water produced from a specific water filing; and although it had acquired by contract with the United States rights under two specific water filings, it was in time of need of water by its stockholders unrestricted from the acquisition of water from any available source.

The determination of the District Court in effect changes the 1948 Decree by requiring the Lower Valley Users to pay for the water which it was entitled from 4,500 shares of stock in the Ogden River Water Users' Association despite the Decree provision to the contrary, and despite the court's determination in 1948 that such water from such shares was in exchange for water Ogden City was depriving them by the extraction of water from the wells. But for the exchange, Ogden City would be entitled to no water from the wells.

On the basis of the point argued, the Order of the District Court should be vacated.

The following Points, while differing, are readily associable, and any argument made to one point in a large measure would have to be remade in the consideration of the others with the effect of apparent repetition. For such reason such Points will be argued together. The points are different facets of the same thing.

POINT III.

THE COURT ERRED IN DETERMINING THAT THE WATER ALLOTTED TO OGDEN CITY, WHICH WAS OBTAINED FROM THE UTAH POWER & LIGHT COMPANY BY THE OGDEN RIVER WATER USERS' ASSOCIATION, IS NOT SUBJECT TO PARAGRAPH 7 OF THE DECREE OF APRIL 1, 1948.

POINT IV.

THE COURT ERRED IN DETERMINING THAT THE WATER ACQUIRED BY THE OGDEN RIVER WATER USERS' ASSOCIATION FROM THE UTAH POWER & LIGHT COMPANY WAS NOT INTENDED OR CONTEMPLATED BY THE PARTIES TO THE STIPULATION BETWEEN OGDEN CITY AND THE LOWER VALLEY USERS.

POINT V.

THE COURT ERRED IN REQUIRING THE LOWER VALLEY USERS TO PAY FOR THE WATER ACQUIRED BY OGDEN CITY BY VIRTUE OF ITS OWNERSHIP OF 4,500 SHARES OF STOCK OF THE OGDEN RIVER WATER USERS' ASSOCIATION, AND IN REQUIRING OF THE LOWER VALLEY USERS TO PAY ANY COST OR EXPENSE TO OGDEN CITY WHATSOEVER TO ENABLE THE LOWER VALLEY USERS TO SECURE SUCH WATER.

POINT VI.

THE COURT ERRED IN DETERMINING THAT ANY WATER TO WHICH IT WAS ENTITLED UPON 4,500 SHARES OF STOCK OF OGDEN RIVER WATER USERS' ASSOCIATION BELONGED TO OGDEN CITY FOR ANY PURPOSE OTHER THAN ITS DELIVERY TO THE LOWER VALLEY USERS IN EXCHANGE FOR WATER WHICH OGDEN CITY DIVERTED FROM ITS WELLS.

To simplify the presentation of the argument based on these points, it is thought that three paragraphs might here be made:

1. The Rationale
2. The 1948 Decree Pertinent Provisions
3. The Situation in 1959

*The Rationale.* Individuals and companies first appropriated water from the Ogden River in 1848. There were subsequent appropriators. Between 1914 and 1932 Ogden City drove some 48 wells in the artesian well basin. Controversy existed between prior appropriators of water and Ogden City. Because of this situation, a stipulation was made, dated July 23, 1929, between the parties; and a decree was made July 31, 1929, based on such stipulation. The Ogden River Water Users' Association was formed in November, 1933; and Ogden City subscribed to 10,000 shares of stock in said Corporation to ready itself to supply water to prior appropriators in exchange for the water being taken by it from the wells.

*The 1948 Decree Pertinent Provisions.* A Decree was made April 1, 1948, in the matter of the determination of water rights on Ogden River. By such Decree rights

numbered 1 to 36 were set forth having variable priorities between 1848 and 1890. The holders of such rights were designated "Lower Valley Users." The date of priority of the Ogden City wells was of variable dates between 1914 and 1932. To carry out the stipulation of the Lower Valley Users and Ogden City and their stipulation made the day of the hearing, the court inserted in the Decree its paragraph (7), the same being the culmination and the result of meetings theretofore had between representatives of the City and the Lower Valley Users. Such provided for an exchange of waters — the City giving waters from 4,500 shares of stock in the Ogden River Water Users' Association in exchange for the waters it was taking and had been taking from the wells and withholding from other water users of the River. Paragraph 9 (a) of the Decree provided that the wells should not be shut off so long as the provisions of paragraph (7) are carried out.

*The Situation in 1959.* Early in 1959 when it became apparent that the water yield from water rights acquired by the Association from the United States would be inadequate to deliver to each stockholder of the Corporation an acre-foot of water for each share of stock, the Association attempted to and did procure water from Utah Power & Light Company and stored the same in the Pine View Reservoir. On June 8, 1959, at a special meeting of the Board of Directors of the Ogden River Water Users' Association all Directors being present, including the Director from Ogden City, unanimously agreed to commingle the waters acquired from the two sources and to deliver to each of its stockholders 70 per

cent of their respective total subscription to stock in the Ogden River Water Users' Association. The effect of this was that Ogden City on its subscription to 10,000 shares of stock in the Ogden River Water Users' Association would be delivered 7,000 acre-feet of water, such water being, if broken down, 3,600 acre-feet of water acquired by the Association by virtue of its contract with the United States and 3,400 acre-feet of water by virtue of its contract with Utah Power & Light Company. Distribution of water was commenced to all of the subscribers upon this basis. Ogden City subsequently brought the immediate action involving these Appellants as representatives of rights of Lower Valley Users, the State Engineer, Ogden River Water Users' Association, and Utah Power & Light Company wherein they contended their entitlement to all of the water represented by their 10,000 shares of stock in the Association, but contending that such water coming to them as had been acquired by the Association from the Utah Power & Light Company was not water which it, under the 1948 Decree, had to deliver to the Lower Valley Users on 4,500 shares of stock in the Association, thus contending that 1,530 (shown variously as 1,540 and 1,544.26) acre-feet of water being supplied to Ogden City was not distributable to the Lower Valley Users. The District Court held in substance Ogden City took such water in trust for the Lower Valley Users, but required the Lower Valley Users in order to get that water to pay for it.

If we start with the premise that the water drawn by Ogden City from its well was water which otherwise

would have belonged to the Lower Valley Users, the initial old-time prior appropriators of the water from the System, and such premise is supported by dates of appropriation, stipulation of the parties, decree based thereon, and the terminal Decree of 1948; and the premise that the City was withholding such water from the Lower Valley Users; and the parties themselves have stipulated that the City might, nevertheless, have such water from such wells providing in exchange therefor they furnish to the Lower Valley Users the waters arising by virtue of Ogden City's ownership of 4,500 shares of stock in the Ogden River Water Users' Association; and the responsibility placed upon Ogden City to make all payments for such water requisite to perfect the rights to the continued use of the water represented by said shares of stock; and the court finding and decreeing in 1948 that such is a fair and equitable exchange; and the court further providing that the wells shall not be shut off so long as the provisions of paragraph (7) are carried out, leads, we submit, to the inescapable conclusion that the water yield from 4,500 shares of stock in said Association belonged solely and exclusively to the Lower Valley Users without cost to them. No, we should not say without cost to them, but at the cost to them of the water from the 48 wells which but for the stipulation and the decree they, the Lower Valley Users, would be entitled to, that is the *quid pro quo* on their part — the *quid pro quo* on the part of Ogden City is the payment for and delivery of all of the water from 4,500 shares of stock in said Association.

It has been argued, and the District Court seemingly finds, that by virtue of the 4,500 shares of stock in said Association Ogden City procured two kinds of water, but Appellants are unable to see this. The Association's business was the acquisition, purchase, and lease of water for its subscribers, and this it has done and distributed such waters pro rata to its subscribers, delivering to them, however, in 1959 but 70 per cent of what had been subscribed, such being all of the water procured or procurable by the Association in the 1959 dry year. The Appellants cannot understand why if the water from 4,500 shares of stock in the Association amounting normally to 4,500 acre-feet of water is an equitable exchange for the water Ogden City through its wells withholds from other water users that 70 per cent thereof could be an unfair, unequitable exchange to Ogden City for the water which it withholds from the other water users and therefore require the Lower Valley Users to pay for part of the water the Decree requires Ogden City to deliver to the Lower Valley Users.

The 4,500 shares of stock in the Association is stock in an association whose business is, whose authority is, and whose obligation is to acquire water for its stockholders. The water yield from the 4,500 shares of stock belongs to the Lower Valley Users.

#### CONCLUSION

Appellants respectfully submit that the Order of the District Court entered August 13, 1959, should be vacated and set aside; the petition of Ogden City be dismissed or

a new order be made affirming the right of the Lower Valley Users to the whole water productivity upon 4,500 shares of stock of Ogden City in the Ogden River Water Users' Association. Further, that Ogden City be required to refund to the Lower Valley Users such moneys as were exacted of them under the Order of August 13, 1959, in order for them to secure the vitally needed water; and that Ogden City be otherwise required to make whole any Lower User adversely effected by such Order of the lower court; and that Ogden City be required to compensate in water or otherwise such of the Lower Valley Users as were deprived of water in 1959. Further, that the obligation of Ogden City to pay for the water arising out of such 4,500 shares of stock in said Association pursuant to the provisions of the Decree of April 1, 1948, be reaffirmed. Further, that the State Engineer be directed and instructed hereafter to distribute water to the Lower Valley Users in accordance with the Decree of April 1, 1948. Appellants pray for their costs and such other relief as is meet.

Respectfully submitted,

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